

REGISTRATION OF PROPERTIES IN STRATA IN KENYA

JASPER N. MWENDA

University of Nairobi
Kenya

ABSTRACT

In recent years, the need to provide title to small units owned by individuals above and under the surface has been increasing. The need for more intensive development on available land, while ensuring security of tenure, has prompted various jurisdictions to search for solutions. Registration of small units is difficult in many jurisdictions due to planning regulations, which regulate minimum parcel sizes on the ground surface. Special legislation to facilitate registration of properties in strata is necessary to facilitate registration of units in high-rise buildings and those units whose sizes are too small for planning regulations to permit them to be regarded as separate parcels on the ground. In response to the need for strata titles in Kenya, an approach utilizing a mixture of general and fixed boundary survey requirements and the English title registration system has been adopted.

This paper reviews the current status of the strata legislation in Kenya and provides opinion on its implementation and lessons that may be useful, especially to developing countries.

INTRODUCTION

Kenya has an area of over 582000 square kilometres and a population of over 28 million. The urban population in Kenya is growing at a rate of 6.5% per annum due to rural-urban migration and natural increase. Most towns are small in size and are growing at a faster rate (9.1% per annum) than the larger ones (*UNCHS, 1998*). The capital city (Nairobi) accounts for 36% of the total urban population. *UNCHS (1998)* states that 55% of residents of

Nairobi live in unplanned settlements. This figure is said to be higher (60% to 80%) in small and medium towns. Urban housing need is estimated to be 60000 units per annum and that the country will require over 10000 hectares of land for housing needs in the main urban areas by the year 2010 (*Obas, 1991*).

Cadastral activity this century will focus more on urban areas and land information management. In developing countries (such as Kenya) effort in provision of necessary security of tenure will need to be directed at both the formal and informal settlements, especially in cities.

BACKGROUND

The Sectional Properties Act, 1987 was introduced "*to provide for the subdivision of buildings into units being owned by individual proprietors and common property to be owned by the proprietors of the units as tenants-in common, and to provide for the use and management of the units and common property and for connected purposes*" (*Government of Kenya, 1987*). Though the Act was given Presidential assent in 1987, its commencement was delayed until 1991, when the necessary regulations were gazetted. The idea of strata titles legislation was suggested in the early 1960s during the drafting of the Registered Land Act but the Government did not accept that proposal. This position was reversed in the 1980s when efforts by the Law Society of Kenya, the Law Reform Commission and the Ministry of Lands and Settlement resulted in the enactment of the Sectional Properties Act (No. 21 of 1987) (*Hamilton, 1991*). A team of government officers visited the Province of Alberta, Canada, in 1989 to study the administration of the Condominium Property Act there.

Situation prior to introduction of strata titles legislation

Previously, when a developer wished to sell individual flats or maisonettes and where for some reason a subdivision survey was not practicable, the developer could apply for registration of an Architect's plan of the building on which the units (flat or maisonettes) were serially numbered under the Registration of Documents Act. *Nyadimo (1992)* lists problems associated with these procedures as that: -

- (i) The content and form of plans to support the issue of titles to flats was not prescribed in the existing legislation. There was no uniformity in the details on the plans and in the manner of delineating individual units.
- (ii) There was no law, which distinguished what was individual property from common property - this was left to the wording of the instrument.

- (iii) Though common services were usually administered by a management company, it was not mandatory under existing law.
- (iv) A company incorporated under the Companies Act was not the most suitable entity for management of common services.
- (v) There were problems in the Land Registry because issue of titles to flats led to a multiplicity of valid titles to the same piece of land.

Provisions in the Sectional Properties Act, 1987

The main focus of the Act is to address the shortcomings in earlier procedures, as previously mentioned. The main provisions include:

- (i) Requirement for Sectional Plans to support titles to parts of buildings, including preparation, form and content of the plans and certificates necessary to authenticate their approvals and technical correctness.
- (ii) Registration of the Sectional Plan, under the Registered Land Act, of a building or parts of a building, where the title on which the building is erected is either freehold or leasehold from the government with an unexpired term of not less than 45 years.
- (iii) On registration of a Sectional Plan in respect of any registered parcel of land, the title of that parcel, subject to the provisions for restoration, shall be cancelled to avoid multiplicity of titles. On such cancellation, no further transaction will be registrable against the title.
- (iv) Substantive law governing rights and duties of proprietors of sectional property and other persons having interests therein.
- (v) A Corporation consisting of the owners of the units in the parcel to which the sectional plan relates or those persons entitled to the parcel on termination of the Sectional Property, is constituted on registration of a sectional plan.
- (vi) The Corporation to have a Board of Management, which will appoint an Institutional Manager to manage, the common property including payment of rates, land rents and insurance premiums on the building.

SURVEY PROCEDURE

Survey procedure involves both fixed and general boundary survey requirements. Before survey and registration of individual units, necessary approvals (such as building and subdivision approvals) from relevant authorities are obtained. A plan for registration as a Sectional Plan should consist of:

- a. A Site and Building Location Plan.
- b. A Floor Plan.

Survey for Site and Building Location Plan

This plan consists of one or more sheets, showing the perimeter of the parcel and location of any buildings erected on that parcel. The survey entails:

- (i) Establishing beacons for the parcel boundaries to fixed boundary standards in accordance with the Survey Act.
- (ii) Surveying of the buildings within the parcel to plottable accuracy using simple tacheometric and chain survey methods. Tie distances and offsets from the appropriate parcel boundary lines are used.

Survey for Floor Plans

The Floor Plan shows the boundaries of each unit to which the Section Plan relates. Unless stipulated otherwise, the boundaries of each unit are the undecorated inner surfaces of the surrounding walls, the undecorated upper surface of the floor and the undecorated surface of the ceiling. A wall includes windows or doors unless stated otherwise. In the survey of the Floor Plan, all unit dimensions are measured to the undecorated interior surfaces at floor level. The *linen tape* may be used for measurement. The related architectural plan may also be used as a guide during measurement of unit dimensions. Wall and ceiling dimensions are approximate and do not include surface finish. For consistency, dimension measurements are made to *0.01m* and floor areas are calculated in *square metres*.

Common property is that part of the parcel that is not comprised in a unit and may include materials of the building, lobbies, balconies, roof areas, under-floor areas and the ground surrounding the building. Common property must be distinguished from the units on the Sectional Plan and a legend is used for additional statements on common property.

Drawing and presentation of Sectional Plans

A plan to be presented for registration as a Sectional Plan should be drawn with the North Point directed upwards, in waterproof ink on tracing linen or polyester film or such other acceptable material and is prepared in sheets. The sheets contain the Site and Building Location Plan and the Floor Plan, respectively, and are drawn to a scale that will allow all details and notation to be clearly shown.

Site and Building Location Plan

The first sheet, which contains the Site and Building Location Plan contains the certificates (from the Surveyor, Local authority and the Proprietor) to authenticate approvals and technical correctness of the plan. The plan also includes certification by the Architect. The schedule with the unit number, unit factor and the floor areas should appear on the first sheet of the plan. The Site and Building Location Plan also shows:

- a. Abutting boundaries, coordinates of beacons, lengths and bearings of external boundaries of the parcel.
- b. External limits of buildings, buildings dimension and tie measurements relating the buildings to the boundaries of the parcel.
- c. Any subsisting easements and rights of way.
- d. Where any encroachment exists in respect of a wall, the relationship of the inner surface of the wall to the parcel boundary beyond which the wall encroaches should be shown.
- e. Exclusive possession areas and the extent of common property area.
- f. Legend to explain the boundaries of units, units of measurement, building locations and measurements.

All building location measurements and exterior building dimensions are to the exterior of the concrete foundation walls or to the exterior surface of the exterior walls. If necessary, an inset may be used to show the points of measurement clearly. Other immovable structures within the parcel such as outside garages and sheds are surveyed including exclusive possession areas where they exist.

The Floor Plan

The Floor Plan illustrates the units that are numbered consecutively starting from unit "No. 1" and ending with a unit number which corresponds with the total number of units in the Sectional Property. Where a numbered unit consists of more than one part, each part is described as part of that unit. A floor plan may include additional sheets containing elevations, sections and any other information as may be necessary to illustrate the units further.

The Act provides for subdivision and consolidation of units. In a plan presented as a Sectional Plan of subdivision or a Sectional Plan of consolidation, the original unit(s) is (are) cancelled in the existing Sectional Plan and the new units are numbered consecutively, the lowest unit number being greater by "One" than the highest existing number on the Sectional Plan. The unit factors for the units in the original Sectional Plan that are

included in the subdivision or consolidation are apportioned among the newly created unit(s).

Unit factors

The unit factor represents the shares each unit owner has in the common property and there determines the quantum of one's share in the Corporation. It determines the rates and other "outgoings" payable by the unit owner and his voting rights at the meetings of the Corporation. A simple formula utilizing the ratio of the unit area to the total area of units in the sectional property is used for determination of unit factors, ignoring other factors (such as the view from the unit, noise, volume and height above the ground). Formulae that consider other factors would be more equitable: this requires further research.

For a given unit, the unit factor is given as $\frac{a}{A} * 10000$

Where a = floor area of the unit in square metres
 A = sum of the floor areas of all the units in the Sectional Property.
 10000 is a figure in the calculation for the convenience of obtaining unit factors as whole numbers.

The *sum* of all derived unit factors should equal 10000 .

REGISTRATION PROCESS UNDER THE ACT

Tenure in a Sectional Property is distinct from ordinary freehold and leasehold in that the owner of a unit holds negotiable title to his own unit while at the same time sharing the title and the cost of operation of the Sectional Property with other owners. The Registered Land Act, 1963, which is based on the English system of registration of title and allows for registration of parcels surveyed with general or fixed boundaries, is used. In a case where a parcel is registered under the Registration of Titles Act (Torrens system), conversion to the English system is required before title can be given to individual units in a Sectional Property on that parcel.

A major requirement in the registration process is that the Registrar does not register a Sectional Plan unless the plan describes two (2) or more units in it. The main features in the registration process are that:

- a. The Sectional Plan is submitted in quadruplicate.
- b. On registration of the Sectional Plan, the register of the parcel described on the Sectional Plan is closed, a separate register for each unit described in the plan is opened and the title deed for the Sectional Property in respect of each unit is issued to the owner/developer. Each individual unit register, which is opened, specifies the unit factor for the unit.
- c. No title deed is issued in respect of the common property but upon registration of a sectional plan, a register is opened for the common property - the register acts as a medium for recording matters such as the schedule for entitlement, the address for services of the notices on the Corporation and alteration of the bylaws.
- d. After a Sectional Plan is registered and the registers for the units are opened, the units may devolve or be transferred, leased or otherwise dealt with in the same manner and form as land held under the Registered Land Act.
- e. Upon registration of a Sectional Plan, a Corporation known as “The Owners, Sectional Plan No....” is constituted.

MANAGEMENT ISSUES

The manner in which unit owners agree to share ownership of the common property is what makes management of a Sectional Property unique. The main challenge in the management of a Sectional Property is effective enforcement of positive obligations of each of the proprietors to maintain their part of the property and to contribute to the cost of the parts enjoyed in common services.

The Corporation

The Corporation is incorporated by the act of registering the sectional plan and not by the filing of any documents with the Registrar of Companies under the Companies Act. The Corporation is therefore not subject to the Companies Act. It has perpetual succession and a common seal and is capable of suing and being sued under the corporate name. The body corporate does not hold the common property beneficially, but only as agent for the proprietors who constitute the membership.

Duties of the Corporation

The Corporation has the responsibility of management of the affairs of the sectional property. A Board of Management is elected and then the Board, in turn, appoints an Institutional Manager to carry out the duties of the Corporation.

Duties of the Corporation include:

- a. Setting bylaws.
- b. Levying contributions for the purpose of its administrative fund. These contributions are levied in respect of each unit and are payable by the proprietors in share proportional to their unit factors.
- c. Maintaining proper and adequate insurance for the property.
- d. Granting leases to unit owners permitting the owners to exercise exclusive possession in respect of common property.

The Corporation sets bylaws to provide for the control, management and administration of the units, the moveable and the immovable property and the common property. The bylaws provided by the Act may serve only as a guideline to the unit owners who, through their Corporation can make a completely new set of bylaws to govern the management of their Sectional Property. This provision of introducing new set of bylaws brings with it "life-style" in the management of the Sectional Property.

Institutional Manager

The following persons or firms may be appointed as Institutional Managers under the Sectional Properties Act 1987:

- a. An accountant registered under the Accountants Act who has held a practicing certificate for a period of not less than five years.
- b. An accountancy firm that has had an office in Kenya for a period of not less than five years.
- c. A person registered as an estate agent under the Estate Agents Act.
- d. An advocate of the High Court of Kenya.

EXTENT OF IMPLEMENTATION

Registration of properties in Strata has begun in major urban centres but has not yet found popular appeal in smaller urban centres and rural areas. The total number of units registered after survey under the provisions of the Sectional Properties Act is slightly over 5000. About 95% of these units are in the City of Nairobi. These properties are almost exclusively for residential use though other uses (especially office use) are expected to feature in the future. *Macoco (2000)* mentions inadequate awareness of strata legislation among developers/landowners, high expense and complexity in management of Sectional Properties and general poor economic performance in the country as possible reasons for low numbers of properties which have been brought under the provisions of strata titles legislation.

Areas under customary land tenure in Kenya do not ordinarily have intensive urban development. Under the Constitution of Kenya, various County Councils hold customary land in trust for people ordinarily resident in their jurisdictions. For strata titles to be registered on customary land, the particular parcel land to contain the Sectional Property would have to be "*set apart*" by the relevant County Council for that particular use. The Commissioner of Lands would then issue a letter of allotment after which survey to facilitate issue of titles would be carried out. Under current legislation the external boundaries of that parcel would have to be surveyed to fixed boundary standards and then be examined by the Director of Surveys.

Surveys involving units below the ground surface have not been encountered so far. It is expected that subsurface units would also be related to the parcel boundaries and registered in the same manner as those above the ground surface. Due to flexibility of general boundaries legislation, it should be possible provide sectional plans without having to use very sophisticated methods of survey.

GENERAL OBSERVATIONS

- a. It is possible to implement a strata titles registration scheme which is inexpensive and which does not make serious technical demands, while offering security of tenure.
- b. Strata titles legislation should be made flexible enough to cover areas with customary tenure, as the need arises. Currently, the Kenya legislation benefits areas with long leases from the Government and land on freehold tenure.
- c. Strata title legislation appears flexible enough to accommodate titles for underground units.
- d. Social and psychological issues relating to living in Sectional Properties in Kenya will require further research *Kiamba (1991)*.
- e. Inexpensive strata titles registration schemes should be designed such that any future upgrade or resurvey would not adversely affect existing title to individual units. This might prove useful in urban settlements

REFERENCES

- Government of Kenya (1987)*: The Sectional Properties Act (No. 21 of 1987), Government Printer, Nairobi.
- Hamilton, J.F.H. (1991)*: The birth of Sectional Properties in Kenya. Paper presented at the Seminar on Sectional Properties Act held on 5th – 7th November 1991 at Milimani Hotel, Nairobi, Kenya.

Kiamba, M. (1991): Land Economics and Housing Management Education for the Implementation of the Sectional Properties Act. Paper presented at the Seminar on Sectional Properties Act held on 5th – 7th November 1991 at Milimani Hotel, Nairobi, Kenya.

Macoco, D.K. (2000): Implementation of the Sectional Properties Act in Kenya, *The Kenya Surveyor*, Vol.8, No.1, pp.19 - 21.

Nyadimo, S. (1992): Survey procedures under the Sectional Properties Act, *The Kenya Surveyor*, Vol.3, No.1, pp.14 - 18.

Ohas, J.M. (1991): Physical Planning Aspects: Implications of the Sectional Properties Act. Paper presented at the Seminar on Sectional Properties Act held on 5th – 7th November 1991 at Milimani Hotel, Nairobi, Kenya.

UNCHS (1998): Towards an East African Community Development Initiative, Nairobi, Kenya.

ABOUT THE AUTHOR

J.N. Mwenda is a lecturer in the Department of Surveying, University of Nairobi. He holds a B Sc. (Eng.) degree from the University of Nairobi and an M Eng. degree from the University of New Brunswick. He is a Full Member of the Institution of Surveyors of Kenya, a Certificated Land Surveyor (East Africa) and a Licensed Surveyor (Kenya). He worked in various capacities in the Survey of Kenya, for 14 years, prior to joining the University of Nairobi in 1990. His research interests are in cadastral surveying and land information management.

CONTACT ADDRESS

Name: Mr. Jasper Ntwiga Mwenda
Institution: Department of Surveying
University of Nairobi
Office address: P.O. Box 30197
Nairobi
Kenya
E-mail: jnmwenda@uonbi.ac.ke